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Supreme Court of the United States

OCTOBER TERM, 1932.

No.

J. J. NATHANSON, PETITIONER,
(APPELLANT BELOW),

vs.

THE UNITED STATES OF AMERICA, RESPONDENT,
(APPELLEE BELOW).

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

1. A criminal information was filed on or about June 11, 1930, by the United States Attorney for the District of New Jersey, charging that the petitioner did knowingly, wilfully and unlawfully possess intoxicating liquor in violation of the National Prohibition Act (27 U. S. C. A. Sec. 40) (R. 4 to 9).

2. Before trial the petitioner moved to set aside the search warrant which had been issued, suppress the evidence obtained thereunder, and for a return of the property seized (R. 1). The motion was subsequently renewed at the trial (R. 11) and the court reserved decision until it had heard the testimony (R. 12).

3. The case then proceeded to trial before the court, a jury having been waived by the defendant.

4. At the end of the taking of testimony, the motion to set aside the search warrant and to suppress the evidence was renewed, and a motion was made for the direction of a verdict on the same grounds (R. 20).

5. The motions were denied, the petitioner found guilty of the crime charged (R. 20), and was subsequently sentenced to pay a fine of $500 (R. 3).

6. An appeal from the judgment was taken to the Circuit Court of Appeals for the Third Circuit which affirmed the judgment of the District Court on March 1, 1933 (R. 35).

II.

Question Presented.

The question here presented is whether or not a search warrant is valid, based upon an affidavit, which only sets forth that the affiant, a Customs officer, "has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave., Atlantic City, N. J.," which premises are used as a private dwelling.

III.

Statutes Involved.

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Tariff Act of 1922, Sept. 21, 1922, c. 356, Title IV, §595, 42 Stat. 983; 19 U. S. C. A. 499:

> "*Search Warrants; Houses Within Ten Feet of Boundary.* If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he may make application, under oath, to any justice of the peace, to any municipal, county, State, or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise. * * *"

Internal Revenue Act, R. S. §3462, 36 Stat. 1167; 26 U. S. C. A. 1195:

> "*Search Warrants.* The several judges of the district courts of the United States, and United States commissioners, may, within their respective jurisdictions, issue a search warrant, authorizing any internal-revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does

believe, that a fraud upon the revenue has been or is being committed upon or by the use of the said premises."

Espionage Act, June 15, 1917, c. 30, Title XI, §3, 40 Stat. 228; 18 U. S. C. A. 613:

> "*Probable Cause and Affidavit.* A search warrant can not be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

National Prohibition Act, October 28, 1919, c. 85, Title II, §2, 41 Stat. 308; 27 U. S. C. A. 11:

> "* * * *Search Warrants.* * * * Section 591 of Title 18 is hereby made applicable in the enforcement of this chapter. Officers mentioned in said section 591 are authorized to issue search warrants under the limitations provided in sections 611 to 631, and 633 of Title 18."

IV.

Statement of the Case.

Francis Loughlin, a customs agent, testified at the trial of the case in the District Court, that he had received information from a prohibition agent who told him that he had seen "stuff" moved in and out of the residence of the petitioner (R. 16). This was the private dwelling of the petitioner (R. 15). The information was also to the effect that the merchandise "was in sacks," but the witness's informant did not know the contents of the sacks (R. 19). The witness also testified that he had received other information from an informer, but refused to divulge the name of his informer (R. 19). With this information in his possession he went to the County Judge of Atlantic County, New Jersey, and made an affidavit

> "that he has cause to suspect and does believe that certain merchandise to wit: Certain liquors of for-

eign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson, said premises being described as a 2 story frame dwelling located at 117 No. Bartram avenue, Atlantic City, N. J." (R. 14).

Upon this affidavit, and this affidavit alone (the contents of which are set forth in the search warrant) the County Judge issued the warrant to search the dwelling house of the petitioner (R. 14). The agent further testified that he himself made the affidavit to obtain the search warrant instead of the prohibition agent, because he understood that only a customs agent could make an affidavit for a customs search warrant and that only customs agents could look for smuggled goods (R. 17 and 18).

V.

Reasons for the Allowance of the Writ.

(1) The Circuit Court of Appeals followed its own decision in *Bookbinder* v. *United States* (287 Fed. 790, certiorari denied 262 U. S. 748), and held that a search warrant issued under the provisions of the Tariff Act on a sworn complaint, phrased in the language of the Tariff Act, is valid and based upon sufficient probable cause, as required by the Fourth Amendment to the Constitution.

The decisions in *Rice* v. *United States* (C. C. A. 1st, 24 Fed. (2d) 479); *United States* v. *Federal Mail Order Corporation* (C. C. A. 2nd, 47 Fed. (2d) 164), and *Wagner* v. *United States* (C. C. A. 8th, 8 Fed. (2d) 581) and other representative decisions cited in the argument, hold that the Fourth Amendment to the Constitution, relating to the issuance of search warrants, applies equally to warrants issued under the Espionage Act and under the Revenue

or Tariff Acts, and that an affidavit containing nothing more than does the affidavit in the instant case is insufficient to support a search warrant.

(2) The decision of the Circuit Court of Appeals conflicts with the principles laid down by this Court in *Grau* v. *United States* (No. 43 October Term, 1932, decided November 7, 1932, 53 Sup. Ct. Rep. 38) and in other decisions of this Court and involves an important question of federal law not yet decided by this Court.

WHEREFORE your petitioner prays that a writ of certiorari issue out of and under the seal of this honorable court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the said Court to certify and send to this court for its review and determination on a day certain to be therein designated, a full and complete transcript of the record and of all the proceedings of the Circuit Court of Appeals in the said case entitled in that court: J. J. Nathanson defendant-appellant, *v.* United States of America, plaintiff-appellee, docket No. 4896, October Term, 1932, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the Circuit Court of Appeals be reversed by this honorable court, and for such other further relief as to this Court may seem proper.

J. J. NATHANSON,

By FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1932.

No.

J. J. NATHANSON, PETITIONER,
(APPELLANT BELOW),

vs.

THE UNITED STATES OF AMERICA, RESPONDENT,
(APPELLEE BELOW).

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals is printed on page 29 of the record.

II.

Jurisdiction.

(1) The jurisdiction of this Court is invoked under Section 240 (A) of the Judicial Code, as amended by the Act of February 13, 1925, c. 299, 43 Stat. 938 (28 U. S. C. A. 347).

(2) The judgment of the Circuit Court of Appeals was entered March 1, 1933 (R. 35).

III.

Statement of the Case.

The facts in the case have already been related in the preceding petition under Title IV, page 4.

IV.

ARGUMENT.

(a) A sworn complaint upon which a search warrant is issued under the provisions of the Tariff Act (September 21, 1922, c. 356 Title IV, §595, 42 Stat. 983, 19 U. S. C. A. 499) must contain sufficient facts from which probable cause is shown for the issuance of such warrant.

The Circuit Court of Appeals in the Third Circuit held (R. 33) that as the warrant in the instant case was issued under the provisions of the Tariff Act, the statement in the affidavit was sufficient to support it. The court also stated in its opinion (R. 31) that "had this warrant issued under authority of the Prohibition Act, it would be invalid, since the affidavit was merely based upon cause to suspect and suspicion."

In reaching its conclusion, the learned court followed its own decision in *Bookbinder* v. *United States* (287 Fed. 790), in which case a similar affidavit and search warrant were involved, though not to search a private dwelling. In other words, the court holds that less is necessary to fulfill the requirements of the Fourth Amendment in the case of a search warrant issued by virtue of the Tariff Act than is necessary in a search warrant issued under the provisions of the National Prohibition Act.

In *United States* v. *Moore* (4 Fed. (2d) 600), the District Court for the Northern District of Maine in the First Circuit, likewise holds (citing the Bookbinder case, *supra*) that a warrant issued under the provisions of the

Tariff Act and based only on an affidavit similar to the one in the instant case, is not violative of the rights guaranteed by the Fourth Amendment to the Constitution.

The foregoing cases draw a distinction between search warrants issued under the Espionage Act to enforce the provisions of the National Prohibition Act and warrants issued to enforce the internal revenue and customs laws, and hold that the latter do not require the same degree of proof to support a search warrant as is required under the National Prohibition Act.

Going to the decisions of the Circuit Courts of Appeals in the First, Second and Eighth Circuits, we find a contrary view. These courts hold that the same test of probable cause must be applied to all search warrants whether they are issued to enforce the provisions of the National Prohibition Act or revenue and customs laws.

In *Rice, et al.* v. *United States* (24 Fed. (2d) 479), the Circuit Court of Appeals for the First Circuit had before it a search warrant issued under the provisions of the Internal Revenue Act (R. S. 3462, 26 U. S. C. A. 1195), which warrant was based upon an affidavit in the language of the statute that the affiant "has reason to believe and does believe" that a fraud is being committed upon the revenue. Upon such proof the court held that the warrant was insufficient to support the search warrant under the Fourth Amendment.

In *Wagner* v. *United States* (C. C. A. 8th, 8 Fed. (2d) 581), the court, in a learned and well considered opinion held that a search warrant issued under the internal revenue statutes is subject to the conditions contained in the Fourth Amendment to the Constitution, and that the provisions of those statutes are to be so construed as not to conflict therewith. In this latter case the affidavit was admittedly insufficient to support a search warrant under the National Prohibition Act. The court held that the

same test of probable cause must be applied to both and so set aside the warrant and suppressed the evidence.

In *United States* v. *Federal Mail Order Corporation* (47 Fed. (2d) 164), Judge Learned Hand of the Circuit Court of Appeals for the Second Circuit, in considering a search warrant issued under the same provision of the Tariff Act as the case at bar (19 U. S. C. A. 499), while finding that the affidavits in support of the warrant did contain sufficient proof of probable cause, nevertheless, before reaching that conclusion on the affidavits assumed that if the warrant had been based on "no more than the unsupported suspicion of a customs officer" it would have failed to meet the constitutional test of probable cause.

It is true that the Rice and Wagner cases, *supra*, were concerned with warrants issued under the internal revenue statutes, while the warrants in the case at bar and in the Federal Mail Order case, *supra*, were issued under the provisions of the Tariff Act. But the general principle is the same. The provisions in each statute are similar. Under the Tariff Act, if a customs officer has "cause to suspect" he may apply for a warrant to search. Under the Internal Revenue Act, if the revenue agent has "reason to believe" he too may apply for a warrant. Yet both must be construed in the light of the Fourth Amendment to the Constitution.

It is therefore clear that a well defined conflict exists between the decision in the instant case in the Third Circuit and the decisions in the other Circuit Courts herein referred to, and it is respectfully submitted that the question involved is of such importance that it should be settled by this Court.

(b) A mere allegation in the complaint or affidavit that the affiant "has cause to suspect and does believe * * *" etc. is not sufficient to support a finding of probable cause upon which a search warrant may issue.

The most recent case decided by this Court on the subject of search warrants is *Grau* v. *United States* (No. 43, October Term, 1932, decided November 7th, 1932, 53 Sup. Ct. Rep. 38), where the validity of a search warrant issued to enforce the provisions of the National Prohibition Act was considered. This Court held that a warrant may issue only upon evidence that would be competent to go before a jury. Tested by this standard the affidavit in the case at bar is clearly insufficient to support the warrant. No facts are set forth in the affidavit, merely an allegation of the affiant's suspicion, which is not evidence that would be competent to go before a jury.

The fact that the warrant in the Grau case, *supra*, was issued under the provisions of the National Prohibition Act is, we submit, immaterial. The principle is the same in each case. The statutes, whether enforcing the provisions of the revenue laws, or otherwise, cannot rise above the Constitution. This Court, in *Locke* v. *United States* (7 Cranch. 339, 3 L. Ed. 364, 11 U. S. 339), in *Boyd* v. *United States* (116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746), in *Gouled* v. *United States* (255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647), and in many other cases has defined the meaning of "probable cause" and the searches that are reasonable and those that are not.

The decision of the Third Circuit in the instant case is in conflict with the principles laid down in those cases, and for this and the other reasons herein set forth, the decision of the court below should be brought before this Court for review.

V.

Conclusion.

Your petitioner respectfully submits that a well defined conflict exists in the Circuit Courts of Appeals as to the effect of the Fourth Amendment to the Constitution on the issuance of search warrants under the provisions of the Tariff and Revenue laws, and that the decision of the Circuit Court of Appeals for the Third Circuit in the instant case deprives your petitioner of his rights as guaranteed by the Fourth Amendment to the Constitution of the United States.

Respectfully submitted,

FREDERIC M. P. PEARSE,
Attorney for and of Counsel with Petitioner.

FREDERIC M. P. PEARSE, JR.,
On the Brief.